

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**DANNY MANZANARES,
Plaintiff,**

vs.

CIV No. 04-270 WPJ/WDS

**CITY OF ALBUQUERQUE,
Defendant.**

**PLAINTIFF'S UNOPPOSED MOTION
TO RESCIND JUDGMENT AND REOPEN CASE**

Plaintiff, Danny Manzanares, through his attorney, Dennis W. Montoya, MONTOYA LAW, INC., pursuant to Fed.R.Civ.P. 60(b)(5) hereby moves this Court to rescind the Judgment entered in this case, reopen the matter, and schedule a Fed.R.Civ.P. 16 scheduling conference to establish case management deadlines. As grounds in support thereof, Plaintiff states:

Factual Background

This case is the companion case to *Manzanares v. Higdon*, No. CIV 05-0095. That case involves the constitutional violation perpetrated against Danny Manzanares by Defendant Sean Higdon. While *Manzanares v. Higdon* involves issues of the liability of the individual officer, this case involves the corollary issues of municipal and supervisory liability that accompany officer Higdon's violations of Mr. Manzanares's rights.

On May 14, 2007, Judgment was entered against Plaintiff in the aforementioned case. The Court dismissed the instant case *sua sponte* on May 17, 2007, citing the Judgment entered against Mr. Manzanares in the *Higdon* case as the basis. Plaintiff took appeal in the related case on June 18, 2007. On August 10, 2009, the Tenth Circuit reversed the Judgment and remanded the case to the Trial Court with instructions to enter judgment in favor of the Plaintiff and hold a trial on damages. capacity, Defendant-Appellee. *Manzanares v. Higdon* --- F.3d ---, 2009 WL 2430643 (2009), attached hereto as Exhibit A.

Analysis

It is undisputed that Plaintiff is required to prove an underlying constitutional violation before he may proceed against the City of Albuquerque for municipal liability. Consequently, the dismissal of this action was appropriate at the time that it was entered. However, given the Tenth Circuit's decision to reverse the judgment and enter judgment in favor of the Plaintiff in *Manzanares v. Higdon*, it is no longer justified.

Plaintiff's request to reopen the instant case under the present circumstances is specifically contemplated by Fed.R.Civ.P. 60(b)(5), which allows a party to move for relief from a final judgment if "a prior judgment upon which [the

subsequent judgment] is based has been reversed or otherwise vacated.” Fed. R. Civ. P. 60(b)(5).

Defendant City of Albuquerque does not oppose this Motion.

WHEREFORE Plaintiff respectfully requests that the Court return this case to active status and set a scheduling conference in order to allow the parties to establish new deadlines in this matter.

Respectfully Submitted,
MONTOYA LAW, INC.

By: _____
Dennis W. Montoya
Attorney for Plaintiff
P.O. Box 15235
Rio Rancho, NM 87174
(505) 246-8499
(505) 246-8599 Facsimile
dmontoya@montoyalaw.com

NOT OPPOSED:

Verbally on 08-20-2009

Kathryn Levy
Assistant City of Albuquerque Attorney

I certify that a true and correct copy of the foregoing was filed on August 20, 2009, via the Court's CM/ECF filing and document delivery system, which upon information and belief after diligent inquiry resulted in its electronic transmission, together with this Certificate of Service, to all counsel of record.

Dennis W. Montoya